Office - Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
A MUNICIPAL CORPORATION,

Petitioner,

vs.

ROYAL INSURANCE COMPANY, LIMITED

PETITION OF CITY OF MORGANTOWN FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

W. G. STATHERS,
Attorney for Petitioner.

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A MUNICIPAL CORPORATION,
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vs.

ROYAL INSURANCE COMPANY, LIMITED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, City of Morgantown, West Virginia, a municipal corporation, respectfully submits its petition for a writ of certiorari to review the order of the United States Circuit Court of Appeals for the Fourth Circuit dismissing an appeal from an order of the District Court for the Northern District of West Virginia. The order of the District Court from which petitioner appealed denied its demand for a jury trial and directed trial of the issues before it as a court of equity.

Summary of the Matter Involved

Royal Insurance Company, Limited, a foreign corporation, instituted an action on October 29, 1947, in the District Court for the Northern District of West Virginia against City of Morgantown, seeking reformation of a fire insurance policy on the ground of mutual mistake. The policy issued by the company insures a city airplane hangar against loss by fire and lightning. Royal Insurance Company, Limited, referred to herein as insurer, sought to reform the policy to insure only against windstorm and hail. The policy was issued on March 22, 1947, and the hangar was totally destroyed by fire on August 20, 1947. The City of Morgantown, referred to herein as insured, promptly filed a proof of loss statement for the full amount stated in the policy. Within the sixty days' limitation against an action by insured to recover on the policy, this action for reformation was instituted by insurer. The insured then filed its answer and counterclaim on the policy. The answer denies the averments of mutual mistake and charges that the insurer is estopped by reason of reliance by the insured upon the policy as written and issued by the insurer. The counterclaim is for recovery on the policy, which claim insured was required to bring into the action under Federal Rules of Civil Procedure, 13(a) for Compulsory Counterclaims. The answer by the insurer to the counterclaim sets up in defense the alleged mutual mistake, which is the basis for its prayer for reformation of the policy in the complaint, and denies the insured's claim on the policy.

The insured filed its demand for a jury trial but, upon motion of the insurer, the demand was stricken by the District Court and the case set down for trial by the court without a jury. The insured appealed to the Circuit Court of Appeals. The insurer moved to dismiss the appeal upon the grounds that (1) the sole issue is equitable, i.e., refor-

mation of a written instrument, (2) the order denying a jury trial is not an interlocutory order within Judicial Code, Section 129, (28 U. S. C. A. 227), (3) the order is not final and not an appealable order.

The Circuit Court of Appeals sustained the motion and dismissed the appeal. The reasons for the dismissal in substance follow the grounds of the motion to dismiss, and are set forth in the written opinion of the Circuit Court of Appeals. (Transcript, page 28.) It is to this order dismissing the appeal that we now seek a writ of certiorari.

Jurisdiction of This Court to Review

Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party. 28 *United States Code*, Section 1254 (1).

An interlocutory order which results in postponement of a trial of a jury action is in substance an order granting an injunction within the meaning of the provisions of Judicial Code, section 129, (since September 1, 1948, Title 28, United States Code, section 1292).

Question Presented

Is the result of the District Court's order postponing a jury trial of the action on the policy in effect an injunction and appealable under Judicial Code, section 129?

Reasons Relied upon for Allowance of Writ

The order of the Circuit Court of Appeals conflicts with the theory and principle of decisions of this court and results in the denial of the constitutional right of jury trial on a legal claim.

The decisions of this Court are distinguished by the Circuit Court of Appeals on grounds of technical differences which have no relation to the theory of the decisions.

A certified transcript of the record has been printed and the required number of copies filed with this petition.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court and that the order herein of said Circuit Court of Appeals be reversed, and for such further relief as to this court may seem proper.

CITY OF MORGANTOWN, WEST VIRGINIA,
A Municipal Corporation,
By Attorney: W. G. STATHERS,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals was delivered on August 31, 1948. It appears in the Transcript, pages 28-31. At the time this brief goes to press it has not been reported.

Statement of the Case

The facts are not involved and require no detailed statement here. They have been fully stated in the Summary of the Matter Involved in the Petition.

Points and Authorities

The order of the District Court has the effect of an injunction and as such is appealable.

Judicial Code, section 129; since September 1, 1948, Title 28, United States Code, section 1292;

Enelow v. New York Life Insurance Company, 293 U. S. 379; 79 L. Ed. 440 (1935);

Adamos v. New York Life Insurance Company, 293 U. S. 386; 79 L. Ed. 444 (1935);

Ettelson v. Metropolitan Life Insurance Company, 42 F. Supp. 488; 317 U. S. 188, 87 L. Ed. 176; 137 F. (2d) 62, cert. den. 320 U. S. 177, 88 L. Ed. 467 (1942).

After loss is incurred under a policy of insurance, the obligation to pay is a legal demand, triable by jury as matter of right.

Federal Rules of Civil Procedure, 38 (a), upon demand, Rule 38 (b), (c);

The Phoenix Mutual Life Insurance Company v. Bailey, 13 Wall. 616, 80 U. S. 568, 20 L. Ed. 501 (1871);

Cable, Adm'x, v. United States Life Insurance Company, 191 U. S. 288, 48 L. Ed. 188 (1903);

Enelow v. New York Life Insurance Company, 293 U. S. 379, 79 L. Ed. 440, 443 (1935);

Prudential Insurance Company v. Saxe, 134 F. (2d) 16, 31-34, cert. den. 319 U. S. 745, 87 L. Ed. 1701 (1943);

Hargrove v. American Central Insurance Company (CCA 10), 125 F. (2d) 225 (1942);

Barnett v. New England Mutual Life Insurance Company (CCA 5), 123 F. (2d) 713 (1941).

The right to trial by jury does not depend upon the nature of the issues or whether raised by complaint or counterclaim but upon whether the remedy at law is adequate.

Cases cited under preceding point, and

Beaunit Mills, Inc. v. Eday Fabric Sales Corporation, (CCA 2), 124 F. (2d) 563 (1942);

1 Moore's Federal Practice, section 13.01, page 672, et seq.;

3 Moore's Federal Practice, section 38.02, page 3013-3015, and supplement thereto.

When reformation in equity would result merely in denial of recovery on the policy and the defense against the policy may be pleaded at law, the remedy at law is adequate.

Wilson v. Queens Insurance Company, etc., 5 Fed. 674 (1881);

United States v. Charles, 74 Fed. 142 (1896);

Raymond v. Toledo, etc. R. Company (Oh. St.), 48 N. E. 1093;

Zuspann v. Roy (Kan.), 170 P. 387;

Mahony v. Standard Gas Engine Company (Cal.), 202 P. 146, syllabus 8, page 150.

A mutual mistake in the drafting of an agreement may be pleaded at common law under the Federal Rules of Civil Procedure, 8(c), and in the State court.

Cases cited under the preceding point, and

Minor's Institutes (Third Edition), Vol. IV, Part II, pages 793, 1334;

Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254, syllabus 1;

12 Am. Jur., Section 125, page 618, under the subject Contracts, "III. Validity: Mistake, Fraud, Duress.";

Federal Rules of Civil Procedure, 8 (c);

Code of West Virginia, Chapter 56, Article 5, Section 5.

Argument

The order of the District Court has the effect of an injunction and as such is appealable under the decisions of this court. (The *Enelow, Adamos* and *Ettelson* cases heretofore cited under Points and Authorities.)

The *Ettelson* case arose after the adoption of the Federal Rules of Civil Procedure and both legal claim and equitable counterclaim were involved in the case. This Court reaffirmed the principle of the *Enelow* and *Adamos* cases, that the order directing a trial of equitable issues by the court in advance of trial of the legal action upon the policy is tantamount to an injunction. The order results in postponement of the jury action on the policy and, in practical effect, may terminate it. The person having the legal claim is in the same position as one who has been restrained by a state court from proceeding in a law action. The *Ettelsbn* case, pages 191-192/ *Judicial Code*, old section 129, new Title 28 United States Code, Section 1292.

After a loss is incurred on a policy of insurance, the obligation to pay is fixed and the sum insured becomes a purely legal demand. *The Phoenix Mutual Life Insurance*

Company v. *Bailey*, 80 U. S. 568, 20 L. Ed. 501; *Cable, Adm'x* v. *United States Life Insurance Company*, 191 U. S. 288, 48 L. Ed. 188; *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, 79 L. Ed. 440, 443.

The Circuit Court of Appeals says our case is not one like the *Ettelson* and *Enelow Cases* (Transcript, page 30). True, there are differences, but they are technical differences and do not affect the application of the principle. The first difference mentioned is that we have a legal counterclaim to an equitable claim rather than an equitable counterclaim to a legal claim. Second, the defense to the recovery on the policy is mistake rather than fraud. Do these facts distinguish the cases in principle from the *Enelow* and *Ettelson Cases?*

The denial by this Court of a writ of certiorari to the decision of the United States Circuit Court of Appeals for the District of Columbia, thereby sustaining the opinion of Mr. Justice Rutledge, in the case of *Prudential Insurance Company* v. *Sage*, 134 F. 2d 16, 31-34, cert. denied, 319 U. S. 745 (1943), disposes of the first difference. In that case, the insurance company filed an action to cancel the policy on the ground of fraud one day before the beneficiary instituted an action to recover on the policy. The beneficiary then filed a compulsory counterclaim in the company's action under the Federal Rules (13a). The District Court refused to try the equitable issue, cancellation, separately and before the trial at law on the policy.

It was argued there that the filing of the counterclaim was a waiver of the right to jury trial. The court refused to accept the argument of waiver by compulsion and discountenanced the idea that the right to a jury trial should depend on "a mere race of diligence." Here, even diligence would not avail. The insured was prohibited from bringing suit within sixty days after loss. While that prohibition

was in force, the insurer instituted its action to reform the policy.

Mr. Justice Rutledge says the test is not the nature of the issues but the adequacy of the remedy at law (The *Saxe Case*, page 32). The question is whether the basic issues are such that they can be fully determined without invoking equitable relief. 1. *Moore's Federal Practice*, section 13.01, page 672, *et seq.*; 3 *Moore's Federal Practice*, section 38.02, pages 3013-3015. This test is discussed with apparent approval in *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation* (CCA 2) 124 F. (2d) 563 (1942), cited in Judge Parker's opinion (Transcript, page 30). The *Beaunit Case* turned on the fact that the counterclaim had been dismissed and for that reason there was no issue for a jury trial. See, also, *Hargrove* v. *American Central Insurance Company* (CCA 10), 125 F. (2d) 225 (1942), and *Barnett* v. *New England Mutual Life Insurance Company* (CCA 5), 123 F. (2d) 713 (1941), which involved legal counterclaims to so-called equitable actions on policies of insurance. In each case, the right to trial by jury was sustained.

The Circuit Court of Appeals adopted insurer's contentions that reformation was necessary to relief against the policy and that such relief is exclusive to courts of equity. It was insured's position that the basic issue is the legal claim on the policy and that the defense of mutual mistake, whether legal or equitable, is available as a defense at law in an action on the policy. Reformation is the remedy, not the issue. It is sought here as a means to avoid liability. The same relief would be afforded insurer by a judgment in its favor. Reformation would be a vain and useless procedure. It would result merely in a cancellation or a denial of recovery on the policy. The property insured has been totally destroyed by fire. No other liability can ever be incurred under this policy. In such case, the remedy at law by defense against the policy is complete and adequate. *Wilson*

v. *Queens Insurance Company, etc.*, 5 Fed. 674, and other cases and authorities cited under Points and Authorities.

Reformation is required only where there is a continuing contract under which the parties' rights and future conduct would be governed or where the reformed contract is set up as the basis for other relief. In the fraud cases, represented by the *Enelow* and *Ettelson Cases*, the relief sought was cancellation. It is an equitable remedy also, as is reformation, yet that fact did not enter into the decision. Cancellation was not necessary there to relief against the policies any more than reformation is necessary here. No affirmative relief is necessary to protect the insurer in either case.

Mistake has always been recognized as a defense at law. When set up in avoidance of the contract, it is not necessary to go into equity to reform the contract. (See cases cited under Points and Authorities.) Mistake as a defense at law is classed with that of fraud: Both are often improperly called equitable pleas, says Professor Minor, whose work, *Minor's Institutes*, is the classic on common law pleading in the Virginias. In matters of fraud and mistake courts of law and equity have always exercised concurrent jurisdiction. *Minor's Institutes*, (Third Edition), Vol. IV, Part II, pages 793; 1334. And see cases, texts, statutes and rules cited in Points and Authorities, part of which are quoted in Appendix to this brief. Under Federal practice, prior to the Rules of Federal Procedure providing one form of Action (Rule 2), if the remedy at law was adequate, the court could not take jurisdiction in equity. Title 28, U.S.C.A. 384. Under Federal Rules, 8 (c), defendant may plead affirmative matters, which include duress, estoppel, fraud and "any other matter constituting an avoidance or affirmative defense."

The Circuit Court of Appeals assumed that reformation was necessary to relief. Mistake gives rise to remedies

other than reformation. The only difference between law and equity in matters of mistake depends upon the character of the remedy. Though a bill in equity for rescission might be entertained, a mistake of fact may be set up as a defense to an action at law.

The case of *Union Mutual Life Insurance Company* v. *Mowry*, 96 U. S. 544, 547. 24 L. Ed. 674, cited by the Circuit Court of Appeals, (Transcript, page 29) contains dictum to the effect that, if there had been an issue of mistake, equity only would have jurisdiction to reform. The case did not involve either mistake as a defense at law or reformation. In other cases cited by the Circuit Court, reformation was precedent to other relief, by action on the contract or counterclaim. Such is not the case here, where insurer merely defends against recovery on the policy and denies all right to recover under the contract as written. Judgment for defendant in a court of law has the same practical effect as either reformation or rescission.

Conclusion

This case is not distinguishable in principle from the *Enelow*, *Adamos* and *Ettelson Cases*, merely because the defense is mistake rather than fraud and the ostensible relief is reformation rather than rescission or cancellation.

If piecemeal appeals are to be discouraged as a matter of public policy, it should not be done at the sacrifice of the litigants consfitutional rights. The determination of the kind of trial at this stage will in fact speed the final decision and termination of the litigation. The conclusion of the Circuit Court of Appeals that this is a "dilatory appeal" should be rejected.

The determination now of the right to a jury trial will result in one trial. If left until final judgment, then a second trial may be required and the litigation extended accordingly, with greater expenditure of time and money

to all parties; otherwise if a jury trial is sustained and it is later held that a trial before the court was proper. In such case, the court may find the facts from the record thus already made before the jury.

The claim on the insurance policy being a legal one, and the insurer's remedy by defense at law being full, complete and adequate, the petitioner's right to trial by jury is preserved to him under the Constitution and decisions of this Court.

It is respectfully submitted that the Circuit Court of Appeals erred in dismissing the appeal and that a writ of certiorari should be granted to review its order of dismissal.

W. G. STATHERS,
Attorney for Petitioner.

APPENDIX

"The common law allows no want or failure of consideration, no fraud in the procurement of the contract, no mistake therein, nor any antecedent matter whatsoever, to be brought forward by plea *against a sealed instrument;* * * *.

"Where the contract is *not sealed*, all the circumstances above enumerated may, even at common law, be proved by *way of defense* to the action on the contract, * * *."

Minor's Institutes, Vol. IV, Part II, page 793.

"The jurisdiction of the courts of equity is *concurrent*, more or less, of cases such as, (1) Accident; (2) Mistake; (3) Fraud; * * *."

Minor's Institutes, Vol. IV, Part II, page 1334.

"Generally courts of law and equity have concurrent jurisdiction of causes of action arising out of fraud, accident, or mistake."

Daniels v. *Gillespie*, 65 W. Va. 366, 64 S. E. 254, syllabus 1.

"A mistake which so affects the validity of an agreement as to render it void or voidable may, ordinarily at least, be asserted as a defense in an action at law or in a suit in equity * * *."

12 Am. Jur., section 125, page 618 "Contracts".

"In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, * * * or any other matter, as would entitle him * * * to relief in equity, in whole or in part, against the obligation of the contract; * * *."

Code of West Virginia, Chapter 56, Article 5, Section 5.

"(c) Affirmative Defenses. In pleading to a preceding pleading a party shall set forth affirmatively * * * estoppel, failure of consideration, fraud * * * and any other matter constituting an avoidance or affirmative defense * * *."

Federal Rules of Civil Procedure, 8(c).